(1)

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

WIM DELVOYE, in the Matter of Sebastian Delvoye, an infant under the age of one,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a two-and-one half month old child have a "habitual residence" as that term is used in the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, *re-printed in* 51 Fed. Reg. 10,494 (1986), implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, et seq. (2003), and, as a result, be protected by the Hague Convention, to which the United States is a signatory nation?

LIST OF PARTIES TO THE PROCEEDINGS

All parties to these proceedings appear in the caption of the case that appears on the cover page to this Petition.

RULE 29.6 STATEMENT

Petitioner states that he is an individual and is therefore not subject to Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wim Delvoye respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit dated May 20, 2003 (Appendix ["A"]-1-A-9), the decision as to which review is sought in this Court, is officially reported at 329 F.3d 330.

The opinion of the District Court for the District of New Jersey dated September 27, 2002 (A-11-A-28) is officially reported at 224 F. Supp. 2d 843.

JURISDICTION

The District Court had original jurisdiction of this case pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (1986), and section 11603(a) of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11603(a) (2003), which implements the Hague Convention in the United States.

The Court of Appeals had appellate jurisdiction of this case pursuant to 28 U.S.C. § 1291. The decision of the Court of Appeals was entered on May 20, 2003.

This Court has jurisdiction of this case under 28 U.S.C. §1254(1), and this Petition is timely under Supreme Court Rule 13(1).

STATUTORY PROVISIONS INVOLVED

This case involves Articles 1 through 5 and 8 through 20 of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), *done* Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986), implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, *et seq.* (1995), and Sections 11601 and 11603 of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601, 11603 (1995).

Articles 1 through 5 and 8 through 20 of the Hague Convention and ICARA §§ 11601 and 11603 are set forth in full in the within Appendix.

STATEMENT OF THE CASE

1. The Purpose and Framework of the Hague Convention

The Hague Convention provides for the return of children "wrongfully removed to or retained in" any signatory country to the Convention (a "Contracting State"). Hague Convention, Art. 1. Both the United States and Belgium are Contracting States to the Convention. In the United States, any person seeking the return of a child under the Convention may commence a civil action for an order of return by filing a petition in a federal district court or a state court where the child is located. ICARA § 11603(a), (b). ICARA vests in the court only the authority to determine whether the child's removal was "wrongful" within the meaning of the Convention. ICARA § 11603(e)(1)(A). An ICARA hearing is not a custody hearing; it merely determines which country should hear the underlying custody claim. Hague Convention, Arts. 16, 19.

A child's removal from or retention in a Contracting State is "wrongful" where (a) it is in breach of rights of custody attributed to a person, either jointly or alone, under the law

of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Hague Convention, Art. 3. The Hague Convention applies to any child who was habitually resident in a Contracting State immediately before any breach of custody rights and ceases to apply when the child attains the age of 16 years. Hague Convention, Art. 4.

"[T]he cornerstone of the Convention is the mandated return of the child to his or her circumstances prior to the abduction if one parent's removal of the child from or retention in a Contracting State has violated the custody rights of the other, and is, therefore, 'wrongful.'" *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995) (citing the Hague Convention, Art. 12). Where a petitioner establishes that the child's removal was wrongful, the court "shall order the return of the child forthwith" to the child's habitual residence, unless the respondent establishes one of more of four limited exceptions.[1] Hague Convention, Arts. 12, 13, 20. Indeed, courts "retain the discretion to order return even if one of the exceptions is proven." *Feder*, 63 F.3d at 226 (citing Pub. Notice 957, 51 Fed. Reg. 10494, 10509 (1986)).

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[1] These exceptions, which are not at issue on this Petition, are: (1) the ICARA proceeding was not commenced within one year of the child's removal; (2) the petitioner was not actually exercising custody rights at the time of removal; (3) there is a grave risk that return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation;" or (4) return "would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms." Hague Convention, Arts. 12, 13, 20.

2. The Factual Background of the Underlying Case

Petitioner Wim Delvoye ("Mr. Delvoye"), a well-known contemporary artist, is a citizen of Belgium who resides and works in a loft in the city of Ghent, Belgium. He also maintains a small studio apartment in New York City that he uses for business purposes approximately three times a year for a week each time. In January or February 2000, Mr. Delvoye and respondent Christina Lee ("Ms. Lee"), a United States Citizen, first met in Venice, Italy and again in Ghent, Belgium. Mr. Delvoye and Ms. Lee thereafter began a romantic relationship that developed "on the Internet, . . . on the phone, [and] was like one of these contemporary relationships." Mr. Delvoye visited Ms. Lee in New York for two or three days in March and April 2000; Ms. Lee visited Mr. Delvoye in Ghent for two weeks thereafter.

At the end of September 2000, Mr. Delvoye, while in Belgium, learned through a phone call from Ms. Lee that she was pregnant with their Child, whom they had conceived in August 2000 while visiting Paris, France. Mr. Delvoye and Ms. Lee discussed the pregnancy by fax, by phone and in person when Mr. Delvoye visited Ms. Lee in New York City in October 2000. They decided to have the Child, and Ms. Lee left for Belgium and began living there with Mr. Delvoye in November 2000.

Sebastian was born in Belgium on May 14, 2001. The testimony is in conflict as to the reasons for and the permanence of the couple's relocation to Belgium and their future plans together. However, it is undisputed that from the date of the Child's birth until July 23, 2001, Mr. Delvoye and Ms. Lee lived together with Sebastian in Ghent, Belgium, and rights of custody were jointly attributed to and exercised by Mr. Delvoye and Ms. Lee under Belgian law.

On July 23, 2001, Ms. Lee removed Sebastian from Belgium with Mr. Delvoye's permission under the guise of her desire to pay a two-week visit to the Child's maternal grandmother in Fort Lee, New Jersey. Ms. Lee bought two round-trip tickets with a return flight two weeks later on August 7, 2001. Mr. Delvoye signed a consent for a United States' passport for Sebastian (which he would have had to do regardless of whether the Child was leaving with his mother for a two-week vacation or forever). It is undisputed that, during a telephone call on August 7, 2001, Ms. Lee first told Mr. Delvoye that she would not be returning to Belgium with Sebastian. Mr. Delvoye never consented, and never would have consented, to Sebastian's permanent or prolonged removal from Belgium.[2]

3. The Proceedings in the District Court

On February 22, 2002, after several unsuccessful attempts to have Ms. Lee return to Belgium with the Child, Mr. Delvoye filed a Petition in the United States District Court for the District of New Jersey pursuant to the Hague Convention and ICARA § 11603(a), (b) for an order compelling Ms. Lee to return Sebastian to Belgium where he was born and had exclusively resided prior to his removal by Ms. Lee so that the courts of Belgium could determine custody and support issues.

The District Court held a hearing on the Petition on June 26 and 27, 2002, and issued its decision and order on September 24, 2002. (A-11-A-27.) The District Court denied the Petition on the ground that Belgium was not Sebastian's habitual residence. The District Court focused its inquiry on the parents' conflicting testimony regarding their *future* intentions for themselves and Sebastian and relied on Ms. Lee's testimony that she did not intend her stay in Belgium to be permanent.

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[2] Each of the foregoing facts is demonstrated in the Record on Appeal to the Court of Appeals for the Third Circuit.

The District Court's decision ignores two fundamental principles underlying the Hague Convention. These are (1) that, to determine habitual residence, the court must "look[ ] back in time, not forward," from the child's removal and "find[ ] any future intentions . . . harbored for [the child] irrelevant to its inquiry." *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995) (internal quotations omitted) (*quoting*, with approval, *Friedrich v. Friedrich ("Friedrich I")*, 983 F.2d 1396, 1401-02 (6th Cir. 1993); and (2) "whatever the parents' intent, habitual residence cannot be acquired without physical presence." *Mozes v. Mozes*, 239 F.3d 1067, 1080 (9th Cir. 2001).

The District Court, in effect, fashioned a new rule of law and implicitly held that a "two month old neonate" such as Sebastian cannot have a habitual residence under the Hague Convention where "the parents shared intentions" regarding where they will live at some future point in time are not settled because a neonate "has not been present [in the place it was before the removal] long enough to have an acclimatization[3] apart from its parents."

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[3] The District Court's reliance on the principle of acclimatization was improper. Acclimatization is the attachment that a mature child may develop in a new country after an alleged wrongful removal. Article 13 of the Hague Convention excuses the duty to return a child to the child's country of habitual residence if a respondent proves, by a preponderance of the evidence, that a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views" has become so acclimatized to its new environment that the child objects to repatriation and, in its discretion, the court chooses to honor the child's wishes. *See, e.g., Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001); *England v. England*, 234 F.3d 268, 272 (5th Cir. 2000). Obviously, acclimatization has no bearing on cases involving children of tender years such as Sebastian and is not relevant to the issue of habitual residence in this case.

4. The Appeal

Mr. Delvoye promptly appealed the District Court judgment to the United States Court of Appeals for the Third Circuit. On May 20, 2003, the Third Circuit affirmed the District Court's holding that Belgium was not Sebastian's habitual residence. The Third Circuit framed the "unique question" attendant to this case as "whether and when a very young infant acquires an habitual residence?" (A-5.) The Third Circuit then proceeded to answer the question:

> Where the parents' relationship has broken down, however, as in this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.

(A-6-A-7.) The Third Circuit held that an infant such as Sebastian (who was two-and-a-half months old at the time of his removal from Belgium) whose parents' intentions as to where they will reside in the future are in conflict does not have a habitual residence and is therefore not afforded the protections of the Hague Convention. Instead, the new rule that flows from the Third Circuit's decision is that whoever grabs the child first gets away with it and gets to have his or her country determine custody and support issues, regardless of where the child was born or resided — in this case, had only ever resided — prior to the removal and regardless of the custody rights of the non-abducting parent in the place the child had resided prior to the removal. Such a result flies in the face of the very purpose of the Hague Convention.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CREATES AN UNPRECEDENTED EXCEPTION TO THE HAGUE CONVENTION WHICH IS IN CONFLICT WITH THE HAGUE CONVENTION ITSELF AS WELL AS OTHER COURTS OF APPEALS' DECISIONS

This Court has never entertained a Hague Convention case. It should do so here. The Third Circuit's ruling is in conflict with the Hague Convention because it arbitrarily excepts certain children from the protections of the Convention. The Third Circuit's ruling also is in conflict with decisions of the Courts of Appeals for both the Sixth and the Eighth Circuits, as well as with a prior Third Circuit decision. For these reasons, the petition for a writ of certiorari should be granted.

1. The Third Circuit's Decision Is in Conflict with The Hague Convention Itself Because There Is No Neonate Exception to Habitual Residence under the Hague Convention

The Third Circuit created a "neonate exception" to habitual residence under the Hague Convention where none was meant to exist. The Hague Convention is explicit as to who is protected under its auspices. Article 4 of the Hague Convention provides:

> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Hague Convention, Art. 4.

The Hague Convention therefore applies to every child under the age of 16 years so long as that child's habitual residence was *in a Contracting State.* The Hague Convention presumes that every child under the age of 16 years has a

habitual residence. The Hague Convention excludes from its protection only those children who have attained the age of 16 years or whose habitual residence was not in a Contracting State. Thus, the Third Circuit's premise, by its very nature, is flawed and fails because there is no neonate exception to habitual residence under the Convention. *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (mother's removal of seven-week-old baby from Mexico where he was born and had resided until removal was wrongful under the Convention).

Any other interpretation of the Hague Convention makes no sense because it leaves some children without the protections afforded by the Hague Convention and, indeed, rewards an abducting parent.

2. The Third Circuit's Analysis of This Case as a So-Called "Settled Intent" Case Is Misplaced Because Sebastian Resided Only in Belgium prior to His Removal

The Third Circuit analyzed this case as if it were a so-called "settled intent" case. "Settled intent" cases are cases in which a court deciding a child's habitual residence has to choose between two or more different countries in which the child had lived *prior* to the alleged wrongful removal or retention. In those cases, the court analyzes the "settled intent" of the parents in determining which of the two or more countries in which the child had resided *prior to* the removal was the child's habitual residence at the time of the removal. A settled intent analysis consists of an analysis of a child's circumstances in each place the child had lived prior to the alleged wrongful removal or retention and the parents' present, shared intentions regarding their child's presence there to determine which place is the child's habitual residence. *See, e.g., Mozes v. Mozes,* 239 F.3d 1067 (9th Cir. 2001), *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995). All of the settled intent cases have concluded that the child at issue in

the case had a habitual residence. Despite many cases where the parents lacked a settled intent to as to where they intended permanently to reside, not one single settled intent case holds that none of the places that a child had lived with its parents prior to the alleged wrongful removal or retention was the child's habitual residence. *See, e.g., Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001) (where the parents disagreed as to the permanence of their relocation to Greece from the United States and one of the children was two months old when it arrived in Greece).

This case, however, is not a settled intent case because no such choice can be made here — Sebastian was born in Belgium and resided exclusively in Belgium with Mr. Delvoye and Ms. Lee until Ms. Lee removed Sebastian from Belgium on July 23, 2001 and took him to the United States. It was thus incorrect for the Third Circuit to analyze this case as if it were a "settled intent" case because Sebastian had only lived in one country — Belgium — prior to his removal by Ms. Lee. "[W]hatever the parents' intent, habitual residence cannot be acquired without physical presence." *Mozes v. Mozes*, 239 F.3d 1067, 1082 (9th Cir. 2001). Sebastian's habitual residence can only be Belgium.

Furthermore, the Third Circuit relied on the District Court's finding that Ms. Lee intended to live in Belgium only temporarily. (A-8.) Even if true, this finding is irrelevant because it is a reflection of future intentions. Moreover, as the Ninth Circuit has held, "[w]hen a child has no clearly established habitual residence elsewhere, it may become habitually resident even in a place where it was intended to live only for a limited time." *Mozes v. Mozes*, 239 F.3d at 1082 (footnote omitted). Even if Ms. Lee indeed had no intent to remain in Belgium forever, Sebastian had no habitual residence elsewhere because he never resided anywhere but Belgium. Thus, Belgium must be Sebastian's habitual residence.

3. The Proper Inquiry Must Focus on the Child's Customary Residence *Prior* to the Removal

The Third Circuit's reliance on Ms. Lee's future intentions as to where she might eventually live squarely conflicts with the inquiry that has been espoused by other Courts of Appeals, as well as a prior decision of the Third Circuit, that one must look back in time to before the removal and not forward. Indeed, the Convention itself provides that "removal or retention of a child is . . . wrongful where it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident *immediately before* the removal or retention." Hague Convention, Art. 3 (emphasis added). Although the Convention does not define the term "habitual residence," the term has been found to mean the child's "customary residence *prior to* the removal." *Friedrich I*, 983 F.2d 1396, 1401 (6th Cir. 1993) (emphasis added).

In *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995), the Third Circuit looked to the Sixth Circuit's decision in *Friedrich I* and stated with approval:

> [e]mphasizing her caretaking role and intentions to return eventually to the United States with Thomas, Mrs. Friedrich argued that Thomas' habitual residence had shifted from Germany to the United States. The court, however, held that Germany was Thomas' habitual residence. Focusing on the child, "look[ing] back in time, not forward[,]" and finding any future intentions that Mrs. Friedrich had harbored for Thomas to reside in the United States irrelevant to its inquiry, the court concluded that Thomas' habitual residence could be "'altered' only by a change in geography [which must occur *before* the questionable removal] and the passage of time, not by changes in parental affection and responsibility." *Id.* at 1401-02.

Feder, 63 F.3d at 222 (emphasis in original; footnote omitted).

As the Sixth Circuit stated in *Friedrich I*:

> This is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore, we hold that Thomas was a habitual resident of Germany at the time of his removal.

Friedrich I, 983 F.2d at 1402. That is precisely what happened here. Sebastian was born in Belgium and resided exclusively in Belgium until his mother removed him to the United States on July 23, 2001. Sebastian was therefore a habitual resident of Belgium. The parents' future intentions are not relevant to the habitual residence analysis of a "one country" case such as this case under the Convention, and taking such future intentions into consideration is in conflict with the prevailing methodology for determining habitual residence.

4. The Third Circuit's Decision Cannot Be Reconciled with *Feder, Nunez-Escudero* and *Friedrich*

The Third Circuit relied on *Feder*, but *Feder* is, after all, a "settled intent" case where the Third Circuit determined that a child who had lived in both the United States and Australia prior to removal was a habitual resident of Australia. The Third Circuit incorrectly relied on *Feder's* "settled intent" language (when Sebastian lived in only one country prior to removal), but conversely ignored *Feder's* guidance for "one country" children — where a child is born and lives exclusively in one country prior to removal, that child's habitual residence is that country. *See Feder*, 63 F.3d at 222. *Accord Friedrich I,* 983 F.2d at 1402. The Third Circuit did not even attempt to reconcile *Friedrich I* with its Opinion.

The relevant facts here are virtually identical to those in *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), where the Eighth Circuit reversed the district court's denial of return and remanded for further proceedings. In *Nunez-Escudero*, the petitioner-father was a citizen of Mexico, while

the respondent-mother was a United States citizen. They married in Mexico in 1992 and had a child in Mexico on July 28, 1993. The respondent mother left Mexico with their seven-week-old infant son and returned to her parents' home in the United States on September 21, 1993. The father petitioned for return. The district court denied return on the ground that the impact of separating the then six-month-old infant from his mother posed a grave risk of harm to the child. The Eighth Circuit reversed, observing that the district court "incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk" of harm. *Id.* at 377.

Moreover, in *Nunez-Escudero*, the district court had not addressed the habitual residence issue, and the respondent-mother argued on appeal that the district court's judgment also could be affirmed on the ground that the child was not a habitual resident of Mexico. Respondent-mother "argue[d] that her son's birth and short stay in Mexico [did] not establish habitual residence there, and compare[d] her baby's situation to that of a baby born to a woman while vacationing in Mexico." *Id.* at 378. The Eighth Circuit refused to affirm the district court's ruling on the alternative ground of habitual residence, stating:

> In [*Friedrich I*], the mother argued that she did not wrongfully remove her son from Germany to the United States because he did not habitually reside in Germany. Id. at 1401. Despite that the son had lived with his parents in Germany for two years, the mother argued the son was a habitual resident of the United States because: (1) he had United States citizenship; (2) the United States was listed as his permanent address for the purpose of documentation; and (3) *she intended to return to the United States with her son when she was discharged from the army*. Id.

> The Sixth Circuit rejected the mother's argument, explaining "[a] person can only have one habitual residence." Id. The court stated that "[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, *not future intentions*." Id. Because the child was born in Germany and lived there exclusively, the court concluded that the child was a habitual resident of Germany. Id. at 1402. The court explained: "habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility." Id.

Id. at 379 (emphasis added).

Furthermore, the Third Circuit's attempt to distinguish this case from *Nunez-Escudero* because "the petitioner and respondent had married in Mexico and lived there together for nearly a year before the child was born [and] a basis existed for finding the child's habitual residence to be in Mexico" is unavailing. That is not the basis for the Eighth Circuit's determination.

Looking back in time, as the Court is required to do, Sebastian was born in Belgium and resided exclusively in Belgium with his mother and father until his mother removed him from Belgium on July 23, 2001. According to *Feder, Friedrich* and *Nunez-Escudero,* Sebastian's habitual residence immediately prior to his removal can only be Belgium.

CONCLUSION

This Court should grant petitioner Wim Delvoye's Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

Dated: August 15, 2003

Respectfully submitted,

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